Supreme Court, U.S.
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No. 99-1475

IN THE

# Supreme Court of the United States

PAMELA STONIER, THINKWORKS, INC.,
and OMNIMENSIONS, INC.,

*Petitioners,*

*v.*

DIGITAL EQUIPMENT CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## LIST OF PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceedings below were petitioners Pamela Stonier, Thinkworks, Inc., and Omnimensions, Inc. ("Petitioners") and respondent Digital Equipment Corporation ("Digital"). Pursuant to Supreme Court Rule 29.6, respondent Digital states that it merged with Compaq Corporation in 1998. The resulting Digital subsidiary was dissolved by merger on December 31, 1999. Compaq Corporation has no parent corporation and no publicly held company owns 10% or more of its shares.

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## RESPONDENT'S STATEMENT OF THE CASE

### A. Introduction

This case arises out of the relationship between Digital and one of its former employees Pamela Stonier. Ms. Stonier and her corporations Thinkworks, Inc. and Omnimensions, Inc. — the Petitioners here — brought suit against Digital in 1996. Petitioners asserted a variety of claims, most of which arose out of Digital's alleged breach of an agreement with Thinkworks under which Thinkworks was to produce a series of six seminars for Digital. Petitioner Stonier also asserted claims arising out of the termination of her employment with Digital.

In a decision dated September 28, 1999, the United States Court of Appeals for the Second Circuit affirmed in part and vacated and remanded in part a decision of the United States District Court for the District of Vermont (Sessions, J.), granting summary judgment against all of Petitioners' claims. Petitioners now seek a writ of certiorari from this Court to review the portion of the Second Circuit's decision affirming summary judgment as to all claims against Digital but the one which was vacated and remanded. For the reasons set forth below, the petition should be denied.

### B. Background Facts

Supreme Court Rule 14.1(g) directs a petitioner to present "[a] concise statement of the case setting out the facts material to consideration of the questions presented." Petitioners here have disregarded this rule and have submitted instead a restatement of the voluminous material they presented below, most of which has no legal relevance or

probative value. Digital would not include a fact section in its opposition were it not for Supreme Court Rule 15.2, which requires that the party opposing a petition for certiorari point out any misstatements contained in the petition. Accordingly, Digital submits the following brief counter-statement of the case identifying and summarizing the facts actually relevant to Petitioners' case.

### 1. *Ms. Stonier's Termination from Digital*

Ms. Stonier is a former Digital employee who was terminated as part of an involuntary reduction in force that affected a number of Digital employees. App. 79.[1] Ms. Stonier was informed that she would be part of the involuntary reduction in force on December 16, 1991. *Id.* She was excused from all of her work responsibilities effective December 20, 1991, but continued to receive her full salary and benefits from Digital during the nine week period between her last day of work and February 21, 1992, her formal termination date. App. 78-79, 83a-84.

As part of her termination from Digital, Ms. Stonier was offered the option of entering into a Transition Financial Support Agreement ("TFSA") with Digital which, in addition to the salary and benefits she was already being paid, would entitle her to a lump sum payment plus benefits beyond her termination in exchange for releasing any potential claims Ms. Stonier might have against Digital. *Id.* Ms. Stonier was given at least forty-five days to consider whether to enter into the TFSA, and was provided the opportunity to consult

1. The record Appendix on appeal is cited as "App. __." The Magistrate Judge's Report and Recommendation is cited as "Rep. at ___" and the Second Circuit's opinion is cited as "Op. at __," using the pagination in Petitioners' Petition.

with counsel of her choosing regarding the TFSA. App. 99. Ms. Stonier availed herself of these opportunities, and after consulting with her counsel and some of her colleagues, Ms. Stonier chose to accept Digital's offer. App. 200. She signed the TFSA on February 12, 1992, with the understanding that by doing so she was waiving any right to sue Digital, and Ms. Stonier acknowledged in her deposition that she was aware of the effect of the waiver at the time she signed it. App. 98-99, 201-02, 234.

### 2. *Ms. Stonier's Formation of Thinkworks and Omnimensions*

Even before she was notified that her position was being terminated, Ms. Stonier had been considering leaving Digital to form her own company to develop her own business ideas, with the hope that she would be able to contract back with Digital to perform services for it. App. 50, 142-151, 161-62. In November or early December 1991, Ms. Stonier had learned of the enactment of the Federal Deposit Insurance Corporation Improvement Act ("FDICIA"). App. 209. She soon grew to believe that (1) banks and financial institutions would need greater technological capacity to assist in FDICIA compliance, and (2) Digital was well poised to respond to this market opportunity. App. 57, 166-67.

After she was notified of her termination, but before it became effective, Ms. Stonier formed Thinkworks and Omnimensions. App. 55. Ms. Stonier envisioned a plan whereby Omnimensions would develop new applications for existing software and would license those applications to Thinkworks, which would in turn contract with Digital. App. 175-77. Ms. Stonier hoped that Thinkworks would be able to build a long-term business relationship with Digital,

beginning with a seminar series on FDICIA compliance and then developing related follow-on activities. App. 56-57.

In an effort to convince key people at Digital of the efficacy of the FDICIA idea, Ms. Stonier held a focus group workshop on FDICIA compliance at the Massachusetts Institute of Technology ("MIT") on May 8, 1992 involving potential experts, members of the banking industry, and Digital personnel. App. 65, 166-68. Petitioners allege that Digital agreed to pay Omnimensions $15,000 for services in connection with that workshop.

### 3. *The Thinkworks Contract*

In May 1992, Thinkworks executed a Consulting Services Agreement ("CSA") with Digital, which is a necessary prerequisite to performing services for Digital. App. 182-83, 188-90. Shortly thereafter, Thinkworks tendered a Work Statement to Digital which included three separate project ideas, or "Modules," which Thinkworks proposed to perform for Digital. App. 118-133. In the Work Statement, Thinkworks stated that "Thinkworks will be pleased to undertake the entire proposed program *or any module individually*." App. 118 (emphasis added). The Work Statement also expressly provided that "If Digital chooses to engage Thinkworks to do work described in this proposal, Digital may accept the entire proposal (OPTION 1) *or any module(s)* (OPTION 2)." App. 129 (emphasis added). On June 10, 1992, Digital accepted one of the three modules — Module 1 — forming the contract at issue in this suit (the "Thinkworks Contract"). App. 68.

The module that Digital accepted provided that Thinkworks would design and produce a seminar series

regarding compliance with FDICIA. App. 120. According to the Thinkworks Contract, there were to be six seminars (and a presentation at a Digital Corporate Leaders Forum ("CLF")) held during the summer and fall of 1992. *Id.* The seminars were meant to inform current and prospective Digital financial services customers about FDICIA's requirements and how Digital products and services could aid compliance with those requirements. App. 57, 213-14.[2] In exchange for Thinkworks' production of the series, Digital agreed to pay $125,000 for the seminars. App. 120-21, 129.

It is instructive for purposes of this litigation that the two modules which Digital did *not* accept proposed a broader relationship. App. 119, 121-22. In Module 2, Thinkworks proposed to work with Digital to develop a "Risk Management Consulting Methodology" which would be "productized" in a computer software medium so that both consulting services and software could be sold to customers. App. 119, 122-26, 128. In Module 3, Thinkworks proposed to train the Digital sales force to use the FDICIA compliance idea to convince customers of the utility of Digital products and services. App. 123. Module 3 would also have involved the development and maintenance of an on-line information bulletin board about FDICIA compliance to which banks could subscribe. App. 122-23. Under both Modules 2 and 3, Thinkworks proposed that it share revenue with Digital according to a to-be-negotiated revenue sharing agreement. App. 124-26, 128. Because Digital did not accept Modules

2. Ironically, Ms. Stonier claims that Digital's offering of CLFs after Thinkworks seminar series failed somehow constituted a misappropriation of Thinkworks' trade secrets, notwithstanding the fact that Digital's CLFs predated Thinkworks' formation, and the CLF presentations remained essentially the same after Thinkworks' formation as they were before. *See* App. 432-33.

2 and 3, Digital and Thinkworks never prepared any revenue sharing agreement. App. 206.

Several weeks before Digital's first payment under the Thinkworks Contract was due, Thinkworks notified Digital that it had entered into a factoring agreement with Capital Funding Services, Inc. ("Capital Funding"). App. 195-97. Under the factoring agreement, Thinkworks assigned to Capital Funding its rights to receive payment of the seminar costs from Digital in exchange for advanced and regular payments from Capital Funding. App. 193-94, 196-97, 134. The factoring agreement thereby protected Thinkworks against the risk of late payment by Digital.

**4. *The Failure of the Seminar Series***

The FDICIA seminar series proved unsuccessful and Thinkworks and Digital, by mutual consent, terminated the series in late November 1992 after only three of the six seminars had been conducted. App. 73-74. By then, it had become apparent that the seminar program was not attracting sufficient interest to justify continuation of the program. *Id.* Despite the fact that cancellation of the series meant that Thinkworks was released from its obligation to Digital to produce the last three seminars, Digital paid $100,000 on the contract.

In August 1993, Capital Funding sued Digital under the assignment, claiming that Digital owed it the balance of the stated contract price — $25,000 — for services rendered by Thinkworks. App. 138. Capital Funding and Digital settled that suit in January 1996, upon payment by Digital of $12,500. *Id.* In return, Capital Funding released all claims against Digital, including specifically claims for payment

arising out of work performed by Thinkworks or arising under the invoices Thinkworks assigned to Capital Funding. App. 138-39.

### 5. *Procedural History*

Ms. Stonier commenced this action in February 1996, a few weeks after the Capital Funding settlement and some three and one-half years after the seminar program came to a close. Initially Ms. Stonier alleged that Digital had breached the Thinkworks Contract by failing to pay the full $125,000 originally contemplated in the Thinkworks Contract and by delaying the payments which were made. The Amended Complaint and Second Amended Complaint drastically broadened the scope of the case, adding claims for wrongful discharge and a variety of torts. Rather than focusing on the FDICIA seminar series and its cessation, the Second Amended Complaint presented a litany of every ill or slight Ms. Stonier imagined she has suffered at Digital's hands from 1991 to the present.

On September 22, 1998, after thorough briefing and a lengthy oral argument, the Magistrate Judge recommended that Digital be granted summary judgment on all twelve counts of Plaintiffs' Second Amended Complaint. The Magistrate Judge concluded that Digital fulfilled its duties under the limited contract at issue in this case, thus disposing of any possible breach of contract claims. Rep. at A20-A24. The Magistrate Judge further concluded that Petitioners' alternative theories of liability were merely futile attempts to avoid the limitations of their contract claims and/or were entirely lacking of any evidentiary support. Rep. at A24-A33.

Petitioners filed objections to the Magistrate Judge's Report and Recommendation. The district court (Judge Sessions presiding) made a *de novo* determination of those portions of the Magistrate Judge's Report and Recommendation to which Plaintiffs' objections were made, and, after careful review of the record, adopted the Magistrate Judge's Recommendation in full on November 17, 1998. Order at A8-A9. Petitioners then sought review by the Second Circuit.

### 6. *The Second Circuit's Decision*

After oral argument, the Second Circuit entered its decision on September 28, 1999, and denied Petitioners' subsequent requests for panel rehearing and rehearing en banc without opinion on December 10, 1999. The Second Circuit's opinion affirmed summary judgment as to all but one of the claims against Digital, and vacated and remanded one $15,000 claim by Omnimensions for further proceedings.

The Second Circuit correctly recognized that, at its heart, this case is about a contract between Digital and Thinkworks in which Thinkworks promised to develop and produce a seminar series in exchange for $125,000. Op. at A3-A4. The court recognized that, although the proposed Modules 2 and 3 contemplated a far-reaching joint venture, Digital accepted only Module 1. *Id.* Petitioners argued that they were entitled to the benefits of Modules 2 and 3 based on theories of oral modification, trade custom, and promissory estoppel. The Second Circuit rejected those theories, as the contract was clear on its face that Digital had only accepted Module 1. Op. at A4. Any reliance by Petitioners on supposed oral promises was therefore unreasonable as a matter of law given the clear written terms of the contract to the contrary. *Id.*

Accordingly, the Second Circuit ruled that all claims premised on the existence of a broader contract were barred. Op. at A4-A5.

The Second Circuit also rejected Petitioners' misappropriation of trade secrets claim, as the supposedly secret information was "readily available to anyone in the industry" and not information of the type protected as trade secret. Op. at A5. The court also concluded that Petitioners had failed to present any evidence in support of Ms. Stonier's wrongful discharge claim. Op. at A6. Ms. Stonier released any wrongful discharge claims when she chose to accept the severance package offered by Digital, and had no evidence that her acceptance of that offer was fraudulently induced. *Id.*

Finally, the Second Circuit reversed the grant of summary judgment as to the oral contract claim by Omnimensions and remanded for further proceedings. Omnimensions alleges that Digital promised to pay $15,000 for the focus group workshop at MIT. Although the Second Circuit found the evidence "sparse," it concluded that a reasonable jury could find in Omnimensions' favor. Op. at A6-A7. The court, however, made clear that Omnimensions' recovery, if it prevails, is limited to that $15,000, plus interest. Op. at A7.

## REASONS FOR DENYING THE WRIT

### *Summary of Argument*

The three "Questions Presented" stated by Petitioners all go to the issue of whether summary judgment was appropriate on the record of this case.[3] A writ of certiorari on any of these "Questions" is inappropriate here for two reasons.

First, there is no controversy concerning the appropriate summary judgment standards, and nothing about the way the Second Circuit applied those standards is worthy of review. In such cases as *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court has discussed and clarified the role of summary judgment, and nothing that Petitioners raise creates any need for this Court to revisit the applicability of well-established summary judgment rules to the particular facts of this case. Petitioners' argument that the Second Circuit overzealously applied Rule 56 is based on nothing more than a misapprehension of the Second Circuit's actions. The court did not improperly assess credibility or weigh evidence. Instead, the Second Circuit determined that most of Petitioners' claims failed as a matter of substantive law, and not as a matter of evidence.

Second, this Court should not review this case because the Court cannot avoid becoming entangled in case-specific evidentiary issues. On the claims that did not fail as a matter of law, the Second Circuit reviewed the detailed factual

3. Notwithstanding the Supreme Court Rule 14.1(a)'s stricture against repetitive questions, Petitioners' three questions all address this same argument.

record and found the evidence allegedly supporting Petitioners' claims to be lacking. In applying the appropriate summary judgment standards, the Second Circuit properly recognized that it was Petitioners' burden to come forward with probative evidence entitling them to relief if believed. The Second Circuit assessed Petitioners' proffered evidence and found that one claim was supported by enough evidence to warrant submission to a jury (and remanded that claim to the district court) and that one claim was utterly lacking in probative evidence (and upheld summary judgment on that claim). If this Court were to grant certiorari to review those determinations, the Court could not avoid entangling itself in these fact-specific issues which are of no importance beyond this matter.

In short, Petitioners' petition does not present any of the issues typically viewed by this Court as a compelling reason to grant certiorari. *See* Sup. Ct. R. 10. The Second Circuit's decision does not conflict with the decision of any other circuit or state court of last resort. The Second Circuit did not decide any important question of federal law that should be settled by this Court. Neither did the Second Circuit depart so far from the "accepted and usual course of judicial proceedings" as to require the intervention of this Court. *Id.* Instead, the asserted error merely "consists of erroneous factual findings or the misapplication of a properly stated rule of law," grounds upon which a petition for a writ of certiorari is "rarely granted." *Id.*

## I. THE SECOND CIRCUIT CORRECTLY APPLIED WELL-ESTABLISHED SUMMARY JUDGMENT STANDARDS; NO IMPORTANT FEDERAL QUESTION IS RAISED BY THE APPLICATION OF THOSE STANDARDS TO THE RECORD FACTS OF THIS CASE.

Petitioners' principal argument for certiorari is simply based on the proposition that the Second Circuit misapplied well-established summary judgment standards to the particular facts of this case. Not only are Petitioners wrong about this, but the issue itself is plainly not worthy of review by this Court.

### A. Petitioners' Attempt to Dress Up its Petition as an Important Federal Question Is Unavailing

Petitioners are unhappy that their claims have no legal merit. This certiorari petition is about nothing more than Petitioners' unwillingness to accept that reality. In a transparent attempt to make their petition more attractive to this Court, Petitioners present their case as an "example" of the way in which trial and appellate courts are "becoming overzealous" in their application of the summary judgment standards established by this Court. Pet. at 25. Petitioners go so far as to suggest that it is time for this Court to revisit its seminal decisions of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986). According to Petitioners, the standards set forth in those cases — as applied by lower courts — threaten to violate the Seventh Amendment by obviating the jury's role. Pet. at 26.

In particular, Petitioners charge that the actions of the lower courts in this case usurped the proper function of a jury. Petitioners profess that, in granting Digital's summary judgment motion, the courts below improperly weighed evidence, assessed credibility, and drew inferences from evidence. Petitioners, however, misapprehend an important step in the summary judgment analysis established by this Court. Before a court reviews the evidence submitted at the summary judgment stage, it must first determine what facts are "material." *Liberty Lobby*, 477 U.S. at 247-48. It is the substantive law governing the claims, as determined by the judge, that dictates which facts are material and which are irrelevant. *Id.* Only conflicting evidence on *material* facts can defeat summary judgment. *Id.*

Petitioners here confuse quantity with materiality. Because they submitted voluminous evidence in opposition to Digital's summary judgment motion, they believe that the courts below could only have rejected that evidence by engaging in an improper assessment of it. This assumption, however, ignores the reality of the situation. The courts below ruled that as a matter of substantive law, not of evidence, Petitioners' claims failed to state a valid cause of action. It is the court's proper function to identify and apply the law to the case at hand, and the courts below did so correctly in this case.

This Court has addressed the proper standards for summary judgment in a number of cases, including the 1986 "trilogy" of *Liberty Lobby*, *Celotex*, and *Matsushita*. Petitioners suggest that there is a need for further guidance from this Court in light of the supposed "practice" of district courts clearing their dockets by improper or overly zealous use of Rule 56. Pet. at 28. Petitioners' attempt to disguise

their petition as being in the public interest cannot conceal the fact that their claim to a writ of certiorari is based only on an argument that the lower courts misapplied the relevant legal standards to the facts of their case. There is nothing in the decisions or record below to suggest that the resolution of Petitioners' case was the result of improper docket clearing or that it is emblematic of some larger problem with the federal courts' use of Rule 56. Indeed, the Magistrate Judge, the District Judge and the Second Circuit all devoted substantial time and attention to Petitioner's claims over a four-year period.

### B. The Second Circuit Did Not Usurp the Jury's Role by Ruling That, as a Matter of Law, Petitioners' Breach of Contract Claims Failed

The heart of Petitioners' case was a breach of contract claim by Thinkworks (and derivatively Omnimensions) against Digital. Petitioners contend that the courts below overlooked substantial evidence pertaining to oral modification of the contract's written terms, the "historical context" of the contract, and evidence on promissory estoppel. Pet. at 16-21. That evidence, although voluminous in amount, was irrelevant as a matter of law. The Second Circuit held that the contract was clear on its face, making its interpretation a matter of law for the court. Op. at A4 (*citing Lawrence-Lynch Corp. v. Department of Envtl. Management*, 467 N.E.2d 838, 840 (Mass. 1984); *Paradise Restaurant, Inc. v. Somerset Enters., Inc.*, 671 A.2d 1258, 1261 (Vt. 1995)). The Second Circuit also ruled that reliance on any supposed oral promises "was unreasonable as a matter of law given the existence of a clear contract." *Id.* (*citing Coll v. PB Diagnostic Sys. Inc.*, 50 F.3d 1115, 1124 (1st Cir. 1995); *Housing Vermont v. Goldsmith & Morris*, 685 A.2d

1086, 1089 (Vt. 1996)). Interpreting the clear language of the contract, the court ruled that Digital had satisfied its limited obligations and that summary judgment was appropriate as to any claims which relied on the existence of a supposed broader contract. Op. at A4-A5.

Petitioners do not contend that the Second Circuit misidentified the law. Rather, they contend that the court incorrectly concluded that the contract was clear on its face and therefore argue that a jury should have been allowed to assess the evidence. The preliminary decision about the clarity of the contract's language, however, is one for the court, not the jury. The court followed the procedure established by *Liberty Lobby*: the court identifies the appropriate substantive law and determines what facts are therefore material. Where a contract is clear on its face, no evidence of oral modification or "historical context" is relevant. The Second Circuit, then, did not usurp the jury's role in resolving those claims against Petitioners.

### C. The Second Circuit Did Not Usurp the Jury's Role by Ruling That, as a Matter of Law, Petitioners' Trade Secrets Claims Failed

The Second Circuit also ruled as a matter of law on Petitioners' misappropriation of trade secrets claims. Thinkworks alleged that Digital misappropriated a number of "trade secrets." The Second Circuit held that the type of information alleged by Thinkworks to have been stolen was "not of the kind protected as a trade secret by either Vermont or Massachusetts law." Op. at A5. Again, it was for the court to decide as a matter of substantive law whether Thinkworks' information was entitled to protection as a trade secret. Only if the court found that it was a trade secret would it have

been for a jury to decide whether Digital had misappropriated that information. Again, the courts below did not place themselves in the role of the jury.

Petitioners admit the "wisdom" of this Court in establishing summary judgment standards to "check spurious claims." Pet. at 29. Petitioners fail to realize, however, that their claims are the very sort of spurious claims Rule 56 is designed to resolve. This Court has previously acted to define the standards by which a court measures a summary judgment motion. This Court cannot, however, be expected to review every application of those standards to the facts of a case. Petitioners seek nothing more here, and their petition should be denied.

## II. THE SECOND CIRCUIT CORRECTLY ASSESSED WHETHER DIGITAL HAD MET ITS BURDEN TO POINT OUT THE ABSENCE OF EVIDENCE TO SUPPORT PETITIONERS' CLAIMS.

Petitioners also contend that the Second Circuit's ruling should be reviewed because Digital failed to satisfy its burden under *Celotex* to point out the absence of evidence to support Petitioners' case. Pet. at 28. To the contrary, Digital did point out, and the courts below agreed, that Petitioners were utterly lacking probative evidence on certain important elements of their claims.

Petitioners continue to press their case, now to the highest court in the land, because of a fundamental misperception about the strength of their claims. Petitioners unfortunately persist in equating the volume of their "evidence" with relevance and probative value. It is well-

settled that only issues of fact that are "genuine" and truly "material" will stave off summary judgment. *Celotex*, 477 U.S. at 325-27. If the evidence proffered by the non-moving party is "not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50. There is a "genuine" dispute only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. In assessing the claims that did not fail as a matter of law, the Second Circuit correctly applied these familiar standards.

### A. The Second Circuit Correctly Held That Petitioners Failed to Present Evidence Sufficient to Support a Fraudulent Inducement Claim

Petitioner Stonier's claim was that, upon her discharge from employment by Digital, she was fraudulently induced to sign a document releasing all claims against Digital. The Second Circuit's conclusions on this point do not raise any important issues of law, but are based on specific evidentiary deficiencies. Petitioners point to the supposedly nefarious circumstances surrounding her transfer from a Digital sales support unit to the unit from which she was eventually terminated. Pet. at 4-12. The Second Circuit, however, correctly recognized that Stonier's allegations of fraud did not match up with her legal claim:

> The fraud Stonier actually alleges, even read in the light most favorable to her, is fraud inducing her to transfer to a new position [within Digital] from which she was ultimately fired. Since Stonier does not allege that she was induced to sign [the release] by any fraudulent misrepresentations, her wrongful discharge claim fails as a matter of law.

Op. at A6. Stonier presented no evidence that the supposed fraud related to the inducement to sign the release. With no relevant or probative evidence, no reasonable jury could return a verdict for her and summary judgment was appropriate. There is no reason for this Court to review this case-specific conclusion.

### B. The Second Circuit's Decision to Remand One Claim Demonstrates That the Court Was Not Overzealous in Its Application of Rule 56 to Petitioners' Claims

The appropriateness of the Second Circuit's review of Petitioners' case is confirmed by the fact that the court reversed summary judgment on one count. The district court granted summary judgment to Digital on all counts. Upon review, however, the Second Circuit reversed the district court on a $15,000 oral contract claim by Petitioner Omnimensions. The Second Circuit concluded that Omnimensions had presented sufficient facts to withstand summary judgment if the "sparse" evidence was viewed in the light most favorable to Omnimensions. Op. at A6. The court therefore remanded that one claim, making clear that Omnimensions' possible recovery was limited to $15,000 plus interest. *Id.* at A6-A7. The evidence presented by Omnimensions consisted of a handwritten offer, a contract drawn up by Digital but never signed, and evidence of an oral promise by Digital to sign the contract and/or oral acceptance of Omnimensions' services. *Id.* The court's analysis of this evidence confirms that, where there was a colorable issue of relevant but conflicting evidence, the Second Circuit recognized that it was for a jury to determine the strength of the claim.

## CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for writ of certiorari in this case.

Respectfully submitted,

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